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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.		
10/607,227	06/26/2003	William E. Spindler	NSC0001	5896		
832	7590	04/21/2008	EXAMINER			
BAKER & DANIELS LLP 111 E. WAYNE STREET SUITE 800 FORT WAYNE, IN 46802				CARRILLO, BIBI SHARIDAN		
ART UNIT		PAPER NUMBER				
1792						
MAIL DATE		DELIVERY MODE				
04/21/2008		PAPER				

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/607,227
Filing Date: June 26, 2003
Appellant(s): SPINDLER, WILLIAM E.

ADAM COX
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 2/12/08 appealing from the Office action
mailed 12/19/07.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

WITHDRAWN REJECTIONS

The following grounds of rejection are not presented for review on appeal because they have been withdrawn by the examiner.

- a) The rejection of Claims 37-80, under 35 U.S.C. 112, first paragraph.
- b) The rejection of Claims 47-52, 56, 58, 62-67, 70, and 73-79, under 35 U.S.C. 112, second paragraph.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,739,327	ARGOBAST ET AL.	04-1998
6,391,840	THOMPSON ET AL.	05-2002
5,743,514	REES	04-1998

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 37-51, 53-66, 68-77, and 79 are rejected under 35 U.S.C. 102(b) as being anticipated by Arbogast et al. (5739327).

Re claims 37-40, 57-59 and 71, Arbogast et al. teach a method of cleaning hard surfaces comprising a first chamber comprising hydrogen peroxide and a second chamber comprising an alkaline solution sufficient to maintain the pH to greater than about 8, in the range of 8.5 to 10.5 (col. 9, lines 15-65). Appellant's claim language of "consisting essentially of" does not overcome the teachings of the reference because appellant has not submitted factual evidence to show that the nitrile activator of Arbogast et al. materially affects the basic and novel characteristics of appellant's claimed invention. The burden rests on appellant to establish that the nitrile activator of

Arbogast et al. materially affects the basic and novel characteristics of appellant's claimed invention. Furthermore, the "consisting essentially of" language does not exclude the presence of other components. Appellant has not amended the claim language to "consisting of".

In claim 37, the claim recites "the cleaning kit comprising"; therefore, the method can include additional steps, and the kit can further include additional containers which include other components such as the nitrile of Arbogast et al. Arbogast et al. teach the components in a liquid or solid matrix (col. 9, lines 20-25, lines 63-68, Example 7 teaches granular compositions.

Re claims 41-44, the limitations are inherently met since Arbogast et al. teach the claimed surfactants.

Re claim 45, col. 6, lines 60-63, col. 8, lines 59-60.

Re claim 46, the limitations are inherently met since col. 9, lines 5-9 teaches the pH maintained in the acidic range. Re claims 47-51, 62-66, 73-77, refer to col. 8, lines 7-45.

Re claims 53-54, 56, 68, 70, 79, refer to col. 8, lines 60-65.

Re claims 55, 69, refer to col. 9, lines 10-15.

Re claim 60, refer to col. 9, lines 45-47.

Re claim 61, refer to col. 9, lines 60-65.

Re claim 72, refer to col. 9, lines 50-54.

3. Claims 37-47, and 53-55 are rejected under 35 U.S.C. 102(b) as being anticipated by Rees (5743514).

Rees teaches a method of cleaning a hard surface comprising a first vessel comprising peroxide and a second vessel comprising an alkaline agent (col. 6, lines 10-15) to raise the pH within the range of from 7-13 (claim 18).

Re claim 38, refer to col. 2-3 bridging.

Re claim 39, refer to col. 3, lines 20-22. Appellant's claim language of "consisting essentially of" does not overcome the teachings of the reference because appellant has not submitted factual evidence to show that the lactones of Rees materially affect the basic and novel characteristics of appellant's claimed invention. The burden rests on appellant to establish that the lactones of Rees materially affect the basic and novel characteristics of appellant's claimed invention. Furthermore, the claim language of "consisting essentially of" does not exclude the addition of other components present in the composition. Appellant has not amended the claim language to "consisting of".

Re claim 40, refer to col. 3, lines 25-31.

Re claims 41-44, the limitations are inherently met since Rees teaches the addition of surfactants of the cleaning solution.

Re claim 45, refer to col. 4, lines 30-35. Re claim 46, refer to col. 3, lines 25-27.

Re claim 47, refer to col. 5, lines 65-66.

Re claim 53, see col. 11, lines 30-32.

Re claim 54, col. 5, lines 50-53.

Re claim 55, refer to claim 18.

4. Claims 37-51 and 53-56 rejected under 35 U.S.C. 102(b) as being anticipated by Thompson et al. (6391840).

Re claims 37, 39, Thompson et al. teach a composition for cleaning and disinfecting surfaces. Col. 4-5 bridging teaches a two chamber container comprising a)hydrogen peroxide in first chamber and an alkali component in a second chamber, the alkali component raising the pH of the solution to a pH of 11 (col. 14, lines 1-25). Appellant's claim language of "consisting essentially of" does not overcome the teachings of the reference because appellant has not submitted factual evidence to show that the imines or oxaziridines of Thompson materially affect the basic and novel characteristics of applicant's claimed invention. The burden rests on appellant to establish that the imines or oxaziridines of Thompson materially affect the basic and novel characteristics of appellant's claimed invention. Furthermore, the claim language of "consisting essentially of" does not exclude the addition of other components present in the composition.

Re claim 38, refer to col. 12, lines 7-15.

Re claims 40-44, refer to col. 5, lines 5-25.

Re claim 45, refer to col. 5, lines 50-55.

Re claim 46, refer to col. 5, lines 60-63, col. 14, Example 2.

Re claims 47-51, col. 9-col. 10.

Re claim 53, example 2.

Art Unit: 1700

Re claim 54, col. 2, lines 50-51.

Re claim 55, col. 12, lines 5-15.

Re claim 56, col. 9, lines 30-33, lines 55-60, col. 5, lines 50-56, col. 2, lines 45-54.

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was

not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

7. Claims 52, 67, 78, and 80 are rejected under 35 U.S.C. 103(a) as being unpatentable over Arbogast et al. (5739327).

Arbogast et al. teach the invention substantially as claimed with the exception of the diphenyl sulfonate. However, it would have been within the level of the skilled artisan to have modified the method of Arbogast et al. to include diphenyl sulfonates since Arbogast et al. teach that anionic surfactants include sulfonates and linear and branched benzene sulfonates. Arbogast et al. fail to teach the size of the container. However, it would have been well within the level of the skilled artisan to adjust the size of the container depending upon the surface area of the substrate to be cleaned. Clearly, a larger container would be advantageous for cleaning larger surface areas. Changes in size of an article were held to be obvious. In re Rose 105 USPQ 237 (CCPA 1955).

8. Claim 52 is rejected under 35 U.S.C. 103(a) as being unpatentable over Thompson et al. (6391840).

Thompson et al. teach the invention substantially as claimed with the exception of the diphenyl sulfonate. However, it would have been within the level of the skilled artisan to have modified the method of Thompson et al. to include diphenyl sulfonates

since Thompson et al. teach that anionic surfactants include sulfonates and linear and branched benzene sulfonates.

(10) Response to Argument

a) In reference to the rejection of the claims as being anticipated by Arbogast et al., appellant makes the following arguments.

Appellant argues that Arbogast et al.'s cleaning composition further includes a nitrile activator, in combination with the peroxide and alkaline component. Appellant argues that the nitrile activator of the bleaching compositions disclosed by Arbogast et al. is properly excluded by the transitional phrases "consisting essentially of" in independent claims 37, 57, and 71. In support of Appellant's arguments, Appellant submitted the 1.132 Declaration of William E. Spindler, which is included as part of the Evidence Appendix of the Appeal Brief filed 2/21/08. In the Declaration, appellant argues that the nitrile activator of Arbogast et al. reacts with the hydrogen peroxide of Arbogast et al. to form a peroxyimidic acid, which is the bleaching species (paragraph 6 of the Declaration). Appellant argues that the cleaning compositions of the instantly claimed invention does not require nitrile or other "bleach activators", but rather clean and disinfect based on the release of oxygen by the peroxide. Appellant also directs the Examiner to Tables 6 and 7 and argues that the peroxide and detergent are "single phase aqueous solutions" not requiring first and second containers.

Appellant's arguments are unpersuasive for the following reasons.

1) Appellant's claim language of "consisting essentially of" does not exclude the addition of other components present in the cleaning composition. The claims are not amended to include "consisting of" language to exclude the addition of other components. Claim 37 includes the language of "comprising" which can include additional steps in addition to a kit comprising other components, such as a third container having the nitrile activator.

2) There is no support or suggestion in appellant's specification that the bleaching species of the cleaning composition consists only of hydrogen peroxide. The claims do not require that the surface is contacted with only peroxide and alkaline components, nor do the claims require that upon mixing of the peroxide and alkaline component, only oxygen is released from the peroxide and not a peracid. In reference to appellant's arguments that oxygen is not released by the peroxide, col. 15, lines 25-30 teaches that the source of active oxygen itself constitutes a bleaching agent. Col. 6, lines 45-50 teaches that the source of oxygen include hydrogen peroxide. Therefore, the hydrogen peroxide provides a source of oxygen.

3) Appellant has kindly directed the examiner to Tables 6 and 7, which clearly compares the nitrile, peroxide, and alkaline component to a control composition comprising the peroxide and detergent (i.e. alkaline component), without the presence of the nitrile activator. Therefore, appellant's claimed composition of a hydrogen peroxide and alkaline component is no different from the control compositions, cited in Tables 6 and 7 (col. 17-18) of Arbogast et al. Tables 6 and 7 teach that it is well known

to have a composition comprising the peroxide and an alkaline ingredient (i.e. sodium bicarbonate/sodium carbonate), appellant's claimed composition.

4) Appellant further argues that Arbogast et al. fail to teach the cleaning composition in dry form. Appellant is once again directed to col. 7, lines 63-65, col. 8, lines 55-60, Example 7, lines 40-45.

5) Appellant's declaration is unpersuasive because it is based on conclusory statements. Appellant has not provided convincing evidence to show that the additional prior art components materially affect the basic and novel characteristics of appellant's claimed invention.

b) In reference to the rejection of the claims as being anticipated by Rees et al., appellant makes the following arguments.

Appellant argues that Rees' cleaning composition further includes a lactone, in combination with the peroxide and alkaline component. Appellant argues that the lactone present in the bleaching compositions disclosed by Rees is properly excluded by the transitional phrases "consisting essentially of" in independent claims 37, 57, and 71. In support of Appellant's arguments, Appellant submitted the 1.132 Declaration of William E. Spindler, which is included as part of the Evidence Appendix of the Appeal Brief filed 2/21/08. In the Declaration, appellant argues that the lactone of Rees reacts with the hydrogen peroxide of Rees to form a peroxy acid. Appellant argues that the cleaning compositions of the instantly claimed invention does not require lactone, but rather clean and disinfect based on the release of oxygen by the peroxide. Appellant

also directs the Examiner to Comparative Examples 1 and 2 and argues that the peroxide and detergent are "single phase aqueous solutions" not requiring first and second containers.

1) Appellant's claim language of "consisting essentially of" does not exclude the addition of other components present in the cleaning composition. The claims are not amended to include "consisting of" language to exclude the addition of other components. Claim 37 includes the language of "comprising" which can include additional steps in addition to a kit comprising other components, such as a third container further including the lactone of Rees.

2) There is no support or suggestion in appellant's specification that the bleaching species of the cleaning composition consists only of hydrogen peroxide. The claims do not require that the surface is contacted with only peroxide and alkaline components, nor do the claims require that upon mixing of the peroxide and alkaline component, only oxygen is released from the peroxide and not a peracid.

3) Appellant has kindly once again directed the examiner to Comparative Examples 1 and 2 (col. 7-8 bridging), which teaches a composition comprising the peroxide and alkaline component (i.e. Na₂CO₃), without the presence of lactone. Therefore, appellant's claimed composition of a hydrogen peroxide and alkaline component is no different from the compositions recited in the comparative Examples 1 and 2 of Rees. Examples 1 and 2 teach that it is well known to have a composition comprising the peroxide and an alkaline ingredient.

4) Appellant's declaration is unpersuasive because it is based on conclusory statements. Appellant has not provided convincing evidence to show that the additional prior art components materially affect the basic and novel characteristics of appellant's claimed invention.

c) In reference to the rejection of the claims as being anticipated by Thompson et al., appellant makes the following arguments.

Appellant argues that Thompson et al.'s cleaning composition further includes imines and oxaziridines, in combination with the peroxide and alkaline component. Appellant argues that the imines and oxaziridines present in the bleaching compositions disclosed by Thompson et al. are properly excluded by the transitional phrases "consisting essentially of" in independent claims 37, 57, and 71. In support of Appellant's arguments, Appellant submitted the 1.132 Declaration of William E. Spindler, which is included as part of the Evidence Appendix of the Appeal Brief filed 2/21/08. In the Declaration, appellant argues that imines and oxaziridines of Thompson et al. react with the hydrogen peroxide of Thompson to form a peracid.

Appellant argues that the cleaning compositions of the instantly claimed invention do not require imines and oxaziridines, but rather clean and disinfect based on the release of oxygen by the peroxide .

1) Appellant's claim language of "consisting essentially of" does not exclude the addition of other components present in the cleaning composition. The claims are not amended to include "consisting of" language to exclude the addition of other

components. Claim 37 includes the language of “comprising” which can include additional steps in addition to a kit comprising other components, such as a third container further including the imines and oxaziridines of Thompson.

- 2) There is no support or suggestion in appellant's specification that the bleaching species of the cleaning composition consists only of hydrogen peroxide. The claims do not require that the surface is contacted with only peroxide and alkaline components, nor do the claims require that upon mixing of the peroxide and alkaline component, only oxygen is released from the peroxide and not a peracid
- 3) Appellant's declaration is unpersuasive because it is based on conclusory statements. Appellant has not provided convincing evidence to show that the additional prior art components materially affect the basic and novel characteristics of appellant's claimed invention.

d) In reference to the rejections of the claims as being unpatentable over Arbogast et al. and Thompson et al, appellant has provided no new additional arguments.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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